UNITED STATES
v.
SAMUEL MELLOS

IBLA 72-458 Decided April 13, 1973

Appeal from a decision of Administrative Law Judge Graydon E. Holt, (Contest R-922), declaring appellants Bonanza Nos. 1, 2, 3 and 4 placer claims, the Bonanza lode claim, and the Mellos Mill Site null and void.

Affirmed.

Mining Claims: Discovery: Generally

> The discovery of a valuable mineral deposit is essential to a valid claim. A discovery only occurs where minerals have been found within the limits of the claim in such quality and quantity that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine.

Mining Claims: Discovery: Generally -- Mining Claims: Lode Claims

> To constitute discovery upon a lode mining claim, there must be exposed within the limits of the claim a vein or lode of quartz or other rock in place, bearing gold or some other mineral deposit in such quality and quantity which would warrant a prudent man in the expenditure of his time and money with a reasonable prospect of success in developing a valuable mine.

Mining Claims: Discovery: Generally

> To constitute discovery it is not enough that the mineral values exposed might justify further prospecting or exploration to determine whether actual mining operation would be warranted, or that a prudent person might be justified in holding onto the claims with a reasonable hope or expectation that someday there may be uncovered sufficient quantities of

minerals to make their development as a mine economically feasible.

Mining Claims: Determination of Validity -- Administrative Procedure -- Burden of Proof

In a contest against a mining claim, the Government need only present a prima facie case that there has been no discovery; after such a presentation the burden devolves upon the mineral claimant to prove by a preponderance of the evidence that there has been such a discovery.

Mining Claims: Mill Sites -- Mining Claims: Determination of Validity

Where a millsite is used for mining and milling purposes in connection with a mining claim that is held to be invalid, and the claimant does not show that the millsite is being used for mining and milling purposes in connection with any other mining claim, the millsite is properly declared to be invalid.

APPEARANCES: George W. Nilsson, Esq., Los Angeles, California, for appellant; George H. Wheatley, Esq., Office of the Solicitor, U.S. Department of the Interior, Los Angeles, California, for the United States.

OPINION BY MR. RITVO

Samuel Mellos has appealed from a decision of the Administrative Law Judge 1/ dated May 24, 1972, declaring his placer and lode mining claims and millsite null and void.

This contest was initiated by the filing of a complaint by the Riverside Land Office, Bureau of Land Management, U.S. Department of the Interior, on November 1, 1967, alleging, among others that minerals have not been found within the limits of the claims in sufficient quantities to constitute a valid discovery and that the millsite is not used or occupied for mining or milling purposes in connection with a valid mining claim.

An aborted hearing was held April 9, 1969, and final hearing was held on December 16, 1971.

1/ The change of title of the hearing officer from "Hearing Examiner" to "Administrative Law Judge" was effectuated pursuant to order of the Civil Service Commission, 37 F.R. 16787.

Summarized, appellant's principal reasons for appeal from the adverse decision are:

(1) The decision promulgates discovery requirements beyond those set forth in the mining laws, and hence the decision is unconstitutional legislation;

(2) In a mining contest, the Government has the burden of proof;

(3) The Bureau of Land Management has no right to file a contest action;

(4) Title to an unpatented mining claim is substantially the same as fee title, and the Government merely holds title in trust for the appellants;

(5) The decision is contrary to the evidence, appellant having proved a discovery under the prudent man rule.

The testimony and other evidence given at the hearing has been summarized in the decision of the Judge. It is unnecessary here to repeat in full detail that which has already been reported in that decision. We, therefore, will confine our summarization of the evidence to pertinent parts.

The Government's case was based on the testimony of Michael E. Ryman, Mining Engineer for the Bureau. Ryman examined the claims on March 7, 8 and 9, 1967; June 11, 1969; August 17, 18, 25, 26 and 27, 1971, and on September 16 and 17, 1971 (Tr. 30, 31). He testified that there are exposures of volcanics which have been intruded by later volcanics, probably rhyolite and andesite. The northern section has broad dikes trending northwest, or west-northwest, with complex faulting (Tr. 42). A long ridge through the east half of the northwest quarter exposes volcanic rock. The lower elevations to the west and south are overlaid by alluvials eroded from the volcanics (Tr. 43). He saw evidence of exploration for minerals, but was not aware of any actual mining and shipping operations on the claims (Tr. 46).

Using Exhibit 12, a map showing the locations of the claims and the improvements on them, he described a 660-foot long tunnel or adit on the lode claim which then divides into branches 100 to 150 feet in length. This tunnel was driven many years ago by predecessors of the Santa Fe Railroad to recover water from a spring (Exhibit K). A smaller working to the north is about 70 feet long (Tr. 46). An old caved adit in the northwest quarter is about 50 feet

long. There are other "cuts" on the claims. A ditch leads from the adit to a series of ponds where apparently water is piped out (Tr. 46, 47).

During the course of his examinations, he took a number of samples of placer and lode material, which he had assayed principally for gold and silver, but in several cases for tungsten, lithium, titanium, zirconium, chromium, and nickel. Most of the samples showed insignificant amounts of minerals (Ex. 13, 14, 15 and 16). He found no values on the lode claim. The only significant values he found were in samples M 10 and M 11 on the Bonanza No. 1 placer claim, where the mineral values were 17.2 cents per ton of material and 54.2 cents, respectively (Tr. 81, 82).

Ryman went into considerable discussion to support his conclusion that from his examination he did not believe the amount of mineralization on the claims would justify the spending of further time and effort by a prudent man on the claim with a reasonable expectation of developing a paying mine (Tr. 80, 81).

James C. Shields II, a mining engineer consultant, testified on behalf of contestee, that he made a rapid reconnaissance of the claims in 1969 (Tr. 125). He took five samples from the lode claim, of which three produced values. Of these, two weighed three to five pounds; a grab sample was about one-half pound (Tr. 142). These were assayed at $4.90. $23.70 and $34.92 total value per ton, respectively (Tr. 150).

Shields could not arrive at a conclusion with respect to the placer claims which he did not examine (Tr. 147). Concerning the lode claim, he compared the geology to the nearby Tom Reed Mine which reportedly produces valuable minerals of gold, silver, copper and lead (Tr. 131; Ex. K).

He concluded that the prudent man could be justified in proceeding further. He suggested core drilling and the running of induced polarization tests (Tr. 138; Ex. K).

Mellos, 81, testified that he located the claims in 1964, has built access roads, three ponds for drainage, did his annual assessment work and worked the claims (Tr. 163-170). He had at least six samples assayed (Exs. 0.1-0.6). Sample 0.1, taken from inside the upper adit Mary Tunnel (Tr. 172, 173, 182), assayed $5.58 per ton in gold and silver. Sample 0.2 from the same adit across a vein six to eight inches wide assayed at $18.11 per ton in gold and silver (Tr. 173; Ex. 0.1 and 0.2). The remaining samples were fire assays of black sand which had been concentrated by washing

or screening or both from the placer claims and showed values of: $2.94; $4.83; $.54 and $1.03; $1.50 and $1.11, respectively, in gold and silver per ton (Exs. 0.3-0.6). He testified that the millsites were not used in connection with any other claims (Tr. 210).

The final witness on behalf of contestee was Morton Wyler Albert Southard who has been associated with Mellos in various mining ventures since 1958 (Tr. 216-218 and 226, 227). He testified that up to 300 yards an hour of material on the placer claim could be handled by using a bulldozer, grizzly, and shaker screen (Tr. 218, 219). The process he said would yield 25 to 30% of the bulk material as fines consisting of 14% titanium, 5% zirconium, and 7 to 8% black sand. The water supply is more than adequate to take care of the lode and placer processing (Tr. 220).

In his decision the Judge found that "Mr. Mellos unquestionably has devoted a great deal of time and effort on the group of claims since he began locating them in 1963. He has constructed a road, cleared out and extended the adits, and has built reservoir dams to retain sufficient water to conduct both a lode and placer operation on the claims. But this is not in dispute. The issue is whether there has been a discovery of a valuable mineral deposit. The contestee's evidence on this issue is limited."

He pointed out that fire assays are not a normal way to determine the gold content of placer material because it reports the presence of gold which is not necessarily recoverable by placer methods. He then found that there was enough evidence of minerals to justify a search for more, but not enough to establish a discovery.

He concluded:

> "The Bonanza Nos. 1, 2, 3 and 4 Placer claims, and the Bonanza Lode claim and their amended locations are declared null and void for lack of a discovery of a valuable mineral deposit. In the absence of a valid mining claim to support the mill site, the Mellos Mill Site is declared null and void."

We agree.

Under the mining laws of the United States (30 U.S.C. §§ 21 et seq. 1970), the discovery of a valuable mineable deposit is essential to a valid claim. United States v. Carlile, 67 I.D. 417, 427 (1960). It is well established that a discovery sufficient to validate a mining claim has been made:

> * * * [W]here minerals have been found and evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, * * * Castle v. Womble, 19 L.D. 455, 457 (1894).

This test has been accepted by the courts and the Department. United States v. Coleman, 390 U.S. 599 (1968); Chrisman v. Miller, 197 U.S. 313 (1905), Converse v. Udall, 1399 F.2d 616 (9th Cir. 1968), cert denied., 393 U.S. 1025 (1969); United States v. William J. Bartels, Sr., 6 IBLA 124 (1972).

Additionally, the Department has held that to constitute discovery upon a lode mining claim, the following elements are necessary:

1. There must be a vein or lode of quartz or other rock in place.

2. The quartz or other rock in place must carry gold or some other mineral deposit.

3. The two preceding elements, when taken together, must be such as to warrant a prudent man in the expenditure of his time and money in the effort to develop a valuable mine.

Jefferson-Montana Copper Mines Company, 41 L.D. 320 (1912); Frank W. Whitenack, 1 IBLA 156 (1970).

The appellant contends that the claims are valid because minerals have been found on them. However, it is not enough that the mineral values exposed might justify further prospecting or exploration to determine whether actual mining operations would be warranted. Cabot Sedgewick v. B. H. Callahan, 9 IBLA 216 (1973), United States v. Henault Mining Company, 73 I.D. 184 (1966), aff'd, Henault Mining Company, v. Tysk, 419 F.2d 766 (9th Cir. 1969) cert denied. 390 U.S. 950 (1970).

The most that we can find, and when the testimony is carefully analyzed all we believe appellant has actually claimed, is that a prudent person might be justified in holding onto these claims with a reasonable hope or expectation that someday there may be uncovered sufficient quantities of minerals to make their development as a mine economically feasible. This "holding and prospecting" doctrine as a basis for a right to a claim was rejected in Cole v.

[*267] Ralph, 252 U.S. 286, 307 (1920). See also United States v. Ethel Schell Larsen and Minerals Trust Corporation, 9 IBLA 247 (1973).

The appellant also raises several points attacking the method and concepts relied upon by the Department in the evaluation of mining claims. Similar contentions were found unpersuasive in United States v. Richard W. Dummar, 9 IBLA 308 (1973). We add a few comments here. He contends that the decision by the Judge is unconstitutional legislation. This argument was raised in United States v. Glen S. Gunn, 7 IBLA 237, 79 I.D. 588 (1972). This Board stated therein (pp. 591):

> There is no merit to this contention. Appellants recognize the prudent man test of discovery in Castle v. Womble, supra, despite the lack of express statutory language employing the test. The necessity for administrative and judicial declarations of what constitutes a valid discovery because of the lack of explanatory statutory language has long been recognized. See, e. g., Chrisman v. Miller, 197 U.S. 313, 321 (1905). Congress in its many deliberations concerning the mining laws has never seen fit to prescribe a different standard."

Appellant further contends that the Government has the burden of proving there is no discovery. It has long been established, so as to not require extensive comment, that the Government need only present a prima facie case that there has been no discovery; after such a presentation the burden devolves to the mineral claimant to prove by a preponderance of the evidence that there has been such a discovery, Foster v. Seaton, 271 F.2d 836 (D.C. 1959); United States v. Benjamin L. Taylor and Martha L. Taylor, 8 IBLA 264 (1972); United States v. Glen S. Gunn, supra; United States v. Wayne Winters d/b/a Piedras Del Sol Mining Company, 2 IBLA 329, 78 I.D. 193 (1971). Here, the testimony of the government mineral examiner that he extensively examined the claim and workings thereon, and had assayed numerous samples taken therefrom but found no evidence of a valuable mineral deposit that would support a discovery as that term is defined above, is sufficient to establish a prima facie case of a lack of discovery. United States v. Raymond Bass, Betty Yeck, 6 IBLA 113 (1972); United States v. L. B. McGuire, 4 IBLA 307 (1972); United States v. Harold Benson, A-31061 (September 4, 1969).

The appellant asserts that a commercial discovery need not be shown or a profit proved. We agree, but the claimant still must demonstrate that there has been a discovery within the limits of

each claim. The mere presence of minerals is not enough. United States v. Ethel Shell Larsen and Minerals Trust Corporation, 9 IBLA 247, 253, 254.

He further contends that government engineer cannot testify that there was not sufficient mineral for a prudent man to proceed further. To the contrary Government witnesses are competent to testify as experts with reference to the prudent man rule. Udall v. Snyder, 405 F.2d 1179 (1968), cert denied., 396 U.S. 819 (1969); United States v. Larsen, supra; 255, 256.

He also states that the United States cannot bring a contest against a mining claim so long as the claimant does his annual assessment work or until he has had time to develop the claim. Again the law is to the contrary. The United States can bring a contest against a mining claim at any time it desires to determine the validity of a mining claim. United States v. E. M. Johnson, A-30191 (April 2, 1965).

Finally, Mellos says that the withdrawal of the land is illegal because it encompassed 933,400 acres. He cites no authority for this contention. Furthermore, the withdrawal dated June 8, 1967 (Exs. 8 and 9), withdrew only 9,000 acres, including most of the land on which the claims are located, from appropriation under the mining laws.

Since the claims have been found to be invalid for lack of a discovery at the time of the hearing, the withdrawal has had no effect on them. However, if it were pertinent, Mellos would have to demonstrate compliance with the mining laws, including discovery, as of the date of the withdrawal. United States v. William D. Pulliam, 1 IBLA 143 (1970).

The Judge having determined that the mining claims were null and void, and the appellant having testified that the millsites were not used in connection with other claims, the millsites also were properly declared null and void. As was stated in United States v. Jesse W. Crawford, A-30820 (January 29, 1968):

> Where a millsite is used for mining and milling purposes in connection with a mining claim that is held to be invalid, and the claimant does not show that the millsite is being used for mining and milling purposes in connection with any other mining claim, the millsite is properly declared to be invalid.

See also United States v. Ethel Schell Larsen and Minerals Trust Corporation, supra; United States v. Frank Coston, A-30835 (February 23, 1968).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Martin Ritvo, Member

We concur:

Douglas E. Henriques, Member

Edward W. Stuebing, Member.